

THE PEOPLE AS SUPREME COURT: SOME INCOMPLETE NOTES ON SAGER

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Professor Sager's characteristically rich and deep paper¹ reminds us of the possible existence of, and reasons for, "gaps" of a certain sort—gaps between judicial doctrine and the constitutional norms underlying them; gaps between the self-executing (that is, judicially executed) core of section one of the Thirteenth Amendment and the outer reaches of constitutionally permissible (and even preferred) legislation under section two; and, possibly, gaps between the Constitution itself and more general principles of political justice. (He embraces and explicates the first two sets of gaps, but expresses great skepticism about the third set.)

Given this sharp focus on gaps, I should begin by noting that my Comment here is likewise marked by gaps. As with the gaps Professor Sager discusses, the gaps in my Comment are not random; they exhibit a structure. And just as Professor Sager offers a functional account of, for example, the gaps between judicial doctrine and constitutional norms, so shall I now functionally defend the gaps in my Comment: In an effort to stimulate debate and discussion, I shall spend more time discussing those parts of Professor Sager's analysis that do not yet fully persuade me, and less time rehearsing the many areas of common ground.

Make no mistake: the zone of agreement is large and important. I especially commend Professor Sager's pointed emphasis on, and subtle analysis of, issues of minimal entitlements—what I sometimes like to call "40 Acres and a Mule"²—and questions raised by sections one and two of the Thirteenth Amendment. And more generally, I agree that: (1) there are indeed important aspects of constitutional law that are underenforced by judge-fashioned doctrine; (2) there are often good reasons for these gaps; and (3) in his current paper and in earlier work,³ Professor Sager has powerfully explicated many of these reasons.

But having agreed with Professor Sager—and thus (on this point)

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¹ Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410 (1993).

² See, e.g., Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37 (1990).

³ See, e.g., Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

with James Bradley Thayer before him⁴—that gaps do and should exist between case law and the Constitution, I must confess I am less clear whether gaps do not and may not legitimately exist between the Constitution and perfect political justice. Maybe that makes me a positivist—but I need to hear more from Professor Sager than he has offered at this point.

Sager offers three basic reasons for preferring his “pragmatic-justice account” of the Constitution to a “positive account.”⁵ First, he claims that the “abstract liberty-bearing provisions of the Constitution” are just too open-ended to provide much interpretive constraint.⁶ As one who has spent a considerable amount of time and energy examining the Due Process Clauses, the Ninth Amendment, and the Privileges and Immunities Clause, I find this first point somewhat overstated.⁷ To be sure, faithful interpretation here requires judgment and wisdom, and meaning is determinate only within a zone, leaving considerable discretion to the interpreter; but these provisions are not mere inkblots so long as we are willing to bring to bear on them standard interpretive tools of textual, historical, and structural analysis. (I do, however, agree with Professor Sager that the best interpretation of many key constitutional provisions—such as the Thirteenth Amendment—does indeed conduce toward justice, but this happy fact seems to me a contingent one. Many of these justice-conducting provisions, for example, could in theory be amended out of the Constitution.)

Second, Professor Sager points to the “obduracy of the Constitution to amendment” which defeats its “majoritarian bona fides.”⁸ But if, as I believe, We the People have retained—under the Ninth Amendment, and elsewhere—a majoritarian right to amend our Constitution outside Article V, then this second objection may dissolve.⁹ (In earlier work, Professor Sager has been kind enough to note my argument in passing;¹⁰ but neither he nor anyone else has squarely rebutted my analysis, or shown me where I went wrong.)

Third, and most importantly, Professor Sager reminds us that certain critical issues do not depend on “the distribution of popular pref-

⁴ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Lest my invocation be construed as acquiescence, let me say that I find many other aspects of Thayer's classic article less than compelling.

⁵ Sager, *supra* note 1, at 415.

⁶ *Id.* at 416.

⁷ See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) [hereinafter Amar, *Bill of Rights I*]; Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) [hereinafter Amar, *Bill of Rights II*].

⁸ Sager, *supra* note 1, at 416.

⁹ See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

¹⁰ Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893, 906 n.39 (1990).

erences for their substantively correct resolution.”¹¹ Certain “requirements of justice are judgment-driven, not preference-driven.”¹² Here I agree; but perhaps the Constitution could be better understood as a *judgment-driven* but nevertheless *majoritarian* and populist document. In Sager’s terms, the “ground” of decisionmaking by We the People could be “judgment-driven” but the “procedure” could be majoritarian.¹³ On this account, the Constitution would command “respect by virtue of its majoritarian provenance,” but should be viewed not as “merely a rather unusual statute”¹⁴ but rather as (at least at times) a rather unusual declaratory judgment. The Constitution would result not—or not always—from a constitutional “legislature”¹⁵ of We the People, but from Us as a constitutional “judiciary.” It would reflect not merely the “wishes of past generations”¹⁶ but also their judgments. I am not sure whether, in Professor Sager’s taxonomy, this account is a “positive” one or a “pragmatic justice” one, or both, or neither. But like the positive account, this account might open up some space—a gap of sorts—between the Constitution itself and (government officials’ views of) perfect political justice.¹⁷

The “High Court” account is rather simple.¹⁸ Just as Parliament as Sovereign in England sits both as the supreme legislature implementing its will and as the highest court rendering its best judgment about what natural law and justice command,¹⁹ so in America We the People—as sovereign successors to Parliament’s power—enjoy both supreme legislative and supreme judicial power. The Constitution and amendments promulgated by We the People need not always be understood as legislative enactments, as the product of popular *will* creating new rights and duties. Sometimes, various constitutional provisions are better understood as declaratory judgments of We the People as the True High Court, reflecting not popular will but popular judgment. (This account in fact describes much of the popular self-understanding underlying the

¹¹ Sager, *supra* note 1, at 416.

¹² *Id.*

¹³ *Id.* at 418.

¹⁴ *Id.* at 415.

¹⁵ *Id.* at 416.

¹⁶ *Id.*

¹⁷ My parenthetical in this sentence suggests that just as there are gaps between full justice and workable, justiciable doctrine for judges, so too there may be “agency cost” gaps between the people and their imperfect representatives in Congress and state legislatures. Because of these gaps, We the People might well decide to draft constitutional provisions that constrain even legislators’ pursuit of *their own views* of political justice.

¹⁸ For additional elaboration, see Amar, *Bill of Rights II*, *supra* note 7, at 1206-08; Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1081-82 (1991).

¹⁹ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 154, 263 (1969); Thomas C. Grey, *Origin of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 872 (1978).

Bill of Rights and the Reconstruction Amendments.)²⁰ The fact that We the People as Supreme Court act through majoritarian processes is of course no embarrassment; the current U.S. Supreme Court also abides by majority rule (five votes trump four, even if the four are from some external perspective "right"), yet no one doubts it is indeed a court.

If this "High Court" account were accepted, then could the gap Professor Sager seeks to close between the Constitution and perfect political justice reopen? On the "High Court" account, the nine Justices are, in the deepest sense, *inferior* judges. But—and here's the edge—so too are members of Congress, the President, and other ordinary government officials interpreting and applying the Constitution outside adjudication. Unlike Thayer's and Sager's gap between the interpretive power/role of the courts on one side, and the political branches on the other, now we may have a gap between *all* ordinary government officials (and their views of perfect political justice) on the one hand, and the Constitution on the other.

To put the point one final way, perhaps we should switch our implicit observational perch, viewing constitutional interpretation not from the point of view of the nine Justices, but rather of an inferior federal judge. If we start with the nine, we must confront the "inertia" of past Supreme Court decisions; but as Professor Sager notes, "inertia" does not impede the Supreme Court very much, especially in the long run, given its freedom to distinguish or overrule old precedent.²¹ But a lower federal judge faced with an on point five-four ruling of the U.S. Supreme Court has considerably less freedom to ignore the judgment of these five, even if in her view, the four much better approximate perfect political justice. So contrary precedent from a higher court does indeed open up a gap. And this gap has little to do with courts versus legislatures and issues of justiciability—the main target of Sager and Thayer. Rather, it is a gap created because from the point of view of the lower judge, the higher court "got it wrong"—that is, betrayed the best understanding of perfect political justice. And if we see the true High Court as We the People, and various constitutional provisions as declaratory judgments, might not there be a similar gap between Our judgments—the Constitution—and the best understanding of political justice held by constitutionally inferior tribunals (the nine Justices, Congress, the President, and so on)?

²⁰ Amar, *Bill of Rights I*, *supra* note 7, at 1154 n.109; Amar, *Bill of Rights II*, *supra* note 7, at 1205-60, 1268-72.

²¹ Sager, *supra* note 1, at 417.